IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 204.

PLAQUEMINES TROPICAL FRUIT COMPANY,
APPELLANT,

vs.

WILLIAM HENDERSON AND HENRY J. LEOVY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

This case arises by suit in equity filed on February 11, 1895, by the complainant, a corporation organized under the laws of New Jersey, to quiet title and restrain trespass by the defendants upon its lands situated in the Parish of Plaquemines in the State of Louisiana. The complainant traces its title from the United States through the State of Louisiana. (Record, 1–9; printed Record, 1–6.)

The defendants filed a plea, claiming title by purchase from the State of Louisiana and setting up as a bar to this suit a judgment obtained, prior to said purchase, by the State of Louisiana against the complainant herein in a suit involving the lands now in controversy (Record, 17–29; printed Record, 11–18). The material facts regarding said former suit, as shown by the pleadings herein, are as follows:

That suit was brought by the State of Louisiana on January 25, 1892, in the Civil District Court for the Parish of Orleans, State of Louisiana, against the Plaquemines Tropical Fruit Company and Charles C. Buck, its President, for slander of title and damages, a personal action (Record, 18–20; printed Record, 11–12). Later, by amendment, said suit for damages was converted into a suit to quiet title, a petitory action (Record, 21–22; printed Record, 13–14). No Federal question was involved, nor any question affecting the sovereignty of the State or the enforcement of its rights as a sovereign. The suit was "of a civil nature" (Wisconsin *vs.* Pelican Ins. Co., 127 U. S., 265) in which the State appeared as a claimant to certain land, exactly as any private litigant appears.

The petition showed that the Plaquemines Tropical Fruit Company was a corporation organized under the laws of New Jersey (Record, 19; printed Record, 12). An exception to the jurisdiction of the court was filed by the company, averring its domicile to be in New Jersey, and by Buck averring his domicile to be in Maryland (Record, 20; printed Record, 13). The exceptions were overruled and the defendants filed answer, reserving the benefit of their exceptions (Record, 21; printed Record, 13). The case having been tried, judgment was given decreeing that the State of Louisiana was the owner of the land. On appeal to the Supreme Court of the State said judgment was affirmed. Thereupon the defendants obtained a writ of error to the Supreme Court of the United States.

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The State of Louisiana then filed a motion to dismiss the writ of error on the ground that no Federal question was involved in the suit in the State courts and that the record in this Court presented no Federal question properly raised. United with said motion to dismiss was a motion to affirm the judgment of the Supreme Court of Louisiana on the ground that the writ of error was taken for delay only and that the grounds upon which jurisdiction was claimed were frivolous (Record, 26–27; printed Record, 16. Record in Supreme Court of the United States, October term, 1894, No. 735). On October 22, 1894, the writ of error was dismissed "for lack of jurisdiction" without opinion (*id.*), but the judgment of the State court was not affirmed.

The present case, therefore, involves but a single point, and that point arises under the Constitution of the United States and was raised in the appellant's bill of complaint (Record, 6–7, 30; printed Record, 4–5, 18–19), viz: The jurisdiction of the Civil District Court for the Parish of Orleans and the Supreme Court of the State of Louisiana to hear and determine the suit which is now pleaded in bar of the pending suit. If those courts had jurisdiction, the question of title between this complainant on the one hand and the State of Louisiana and her subsequent grantees on the other is *res judicata*. But if those courts were lacking in the judicial power to hear and determine the controversy, their judgment was null and void and cannot now be pleaded in bar.

The question presented for the judgment of this Court is the constitutional right of every State of the Union to have the merits of controversies involved in a suit brought against her citizens by any other State of the Union heard and determined in the courts of the United States. It involves the immunity of a citizen of any State of the Union from suit by any other State in her own courts and the denial of jurisdiction in any court of any State to take cognizance of any suit brought by that State against a citi-

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zen of another State on the ground that there is under the Constitution (at least until further legislation by Congress) an absolute lack of jurisdiction in such State court over the parties. The question also involves the right of one State to have the merits of a suit brought against her citizens by another State tried in the only court which, under the Constitution and laws as they now exist, has jurisdiction of such controversies, viz., the Supreme Court of the United States. A still further and most important question is also involved—whether this Court, having a jurisdiction specially conferred upon it by the Constitution itself (not merely by congressional legislation) for the most weighty reasons, to preserve the harmony and insure the permanence of the Nation, can be ousted of that jurisdiction, either by the inadvertence or design of Congress or by the pleasure of the officials and judges of a State. These questions have never, to our knowledge, been decided by the Supreme Court of the United States, upon a state of facts similar to that presented in this case.

SPECIFICATION OF ERRORS.

The appellant assigns the following as error in the decree of the court below:

First. Because the bill of complaint and plea upon which decree herein was given showed that the suit of The State of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company, the judgment in which is held by said decree to be a bar to this suit, was a suit by a State against citizens of other States, and was shown to be so by the record therein, to which class of suits section 2 of article III of the Constitution of the United States declares "the judicial power of the United States SHALL extend," and which must therefore be tried either in a Federal court exercising the "judicial power" of the United States or in some court from which the defendants may remove or appeal the cause

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on the merits to a Federal court, while said cause of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company was heard and determined in the local courts of the State of Louisiana, from which the defendants could neither remove nor appeal on the merits to any court exercising the "judicial power" of the United States, and therefore the judgment therein was without jurisdiction and void and no bar to this suit.

Second. Because the bill of complaint and plea showed that said suit of The State of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company was not a suit brought in the exercise or assertion of the sovereignty of said State to execute penal laws, enforce penalties, collect taxes, or otherwise, but was an ordinary suit to determine the ownership of certain land, in which the State appeared exactly as an ordinary litigant, and therefore the provision in section 2 of article III of the Constitution of the United States, that the judicial power of the United States "shall extend to" said cause can be enforced without diminution or restriction of the sovereign powers and duties of said State, and it should be so enforced, and therefore the judgment in said suit is no bar to this suit.

Third. Because a Federal court, to wit, the Supreme Court of the United States, was at the time of said suit of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company fully invested by paragraph 2 of section 2 of article III of the Constitution of the United States with jurisdiction to hear and finally determine said cause, while the courts of the State of Louisiana have never been granted such jurisdiction by the Constitution of the United States, and therefore the judgment in said suit was without jurisdiction and void and no bar to this suit.

Fourth. Because the local courts of Louisiana could not exercise jurisdiction in a case to which the Constitution of

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the United States declares the judicial power of the United States shall extend, except after such legislation by Congress as will enable the case to be removed or appealed on the merits to some Federal court, which legislation has been enacted by Congress covering the other cases to which the judicial power of the United States extends, but accidentally or intentionally omitting suits by a State against citizens of other States, and therefore the courts of Louisiana in said suit of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company were without jurisdiction and the judgment therein was void and no bar to this suit.

Fifth. Because the failure of Congress, accidental or otherwise, to pass a law providing for the appeal or removal to a Federal court of a certain class of the cases to which the Constitution of the United States declares the judicial power of the United States shall extend cannot have the effect of making the jurisdiction of the courts of a State, at the option of such State, final and exclusive of the jurisdiction of the courts of the United States, and therefore the judgment of the courts of Louisiana in said suit of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company was without jurisdiction and void and no bar to this suit.

Sixth. Because, until appropriate action by Congress providing for the supervision by the Federal courts, by removal or appeal, over cases between a State and citizens of other States, to which the Constitution of the United States declares the judicial power of the United States shall extend, the jurisdiction in such cases remains exclusively where it was vested by the Constitution, to wit, in the Supreme Court of the United States; that such jurisdiction was vested in said court exclusively at the time of the said suit of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company, and therefore the judgment in said suit was without jurisdiction and void and no bar to this suit.

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Seventh. Because Congress cannot nullify the Constitution of the United States by failing to provide a Federal court for the trial of cases to which the Constitution declares the judicial power of the United States shall extend, nor can Congress bestow concurrent jurisdiction upon the courts of the States in such cases without providing the correlative power of removal or appeal on the merits to some Federal court, so that the jurisdiction of the State courts may not be final and exclusive of the courts and judicial power of the United States, and therefore, no such appeal or removal having been provided for by Congress in suits by a State against citizens of other States, the judgment of the courts of Louisiana in said case of Louisiana *vs.* Charles C. Buck and Plaquemines Tropical Fruit Company was without jurisdiction and void and no bar to this suit.

I.

JURISDICTION AND JUDICIAL POWER.

Jurisdiction "has reference to the power of the court, *over the parties*, over the subject-matter, over the *res* or property in contest, and to the *authority of the court* to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the *nature of the cause of action* and of the relief sought; and this is conferred by the sovereign authority which organizes the court and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * The *power* to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the *authority* vested in it by law in regard to the subject-matter of the cause."

Cooper *vs.* Reynolds, 10 Wall., 308.

Inasmuch, then, as the sovereign is the source of jurisdiction and judicial power, the civil district court for the

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Parish of Orleans had no jurisdiction or judicial power unless it was derived from the sovereign. But in Louisiana, and in every other State, there are two sovereigns, the State and the United States, each supreme within the limits of its own sovereignty as defined by the Constitution of the United States. It is necessary to consider, therefore, first, in which of these sovereigns resides the judicial power, under the Constitution, to hear and determine a cause between a State and a citizen of another State, and, second, whether that sovereign ever conferred that judicial power upon the courts of the State.

"The sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State Judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye."

Chief Justice Taney in Ableman *vs.* Booth, 21 How., 516.

That a corporation is, for jurisdictional purposes, a citizen of the State under whose laws it is incorporated is firmly established by numerous decisions of the Supreme Court.

Ex parte Shaw, 145 U. S., 444.

Wisconsin *vs.* Pelican Ins. Co., 127 U. S., 265.

II.

THE JUDICIAL POWER OF THE UNITED STATES.

The Constitution of the United States provides as follows:

ARTICLE III.

SECTION 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall at stated

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times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. (1) The judicial power *shall extend* to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—*between a State and citizens of another State;*—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and *those in which a State shall be party*, the Supreme Court shall have *original jurisdiction*. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

And this Court has held, speaking by Justice Story, that *all* the judicial power granted to the United States by the Constitution must be vested in some court by Congress.

"The judicial power must, therefore, be vested in some court by Congress; and to suppose that it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound.

"The same expression, 'shall be vested,' occurs in other parts of the Constitution in defining the powers of the other co-ordinate branches of the Government. The first article declares that 'all legislative powers herein granted shall be vested in a Congress of the United States.' Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act and mean only that the legislative power may hereafter be vested? The second article declares that 'the executive power shall be vested in a President of the United States of America.'

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Could Congress vest it in any other person, or is it to await their good pleasure whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

"If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise this anomaly would exist—that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution and thereby defeat the jurisdiction as to all, for the Constitution has not singled out any class on which Congress is bound to act in preference to others."

Martin *vs.* Hunter's Lessee, 1 Wheaton, 329, 330.

"For the reasons which have been already stated we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power." * * *

Martin *vs.* Hunter's Lessee, 1 Wheaton, 331.

"Before the adoption of the Constitution each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise; but when the Constitution was adopted a portion of that judicial power became vested in the new government created, and so far as thus vested it was *withdrawn from the sovereignty of the State.* Now the execution and enforcement of the laws of the United States and the judicial determination of questions arising under them are confided to another sovereign, and to that extent the sovereignty of the State is restricted."

Tennessee *vs.* Davis, 100 U. S., 257.

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III.

WHERE THE POWER MUST BE EXERCISED.

We claim that the entire judicial power surrendered to the United States by the several States, for the common good of all the States, vested absolutely and completely in the United States under the Constitution. By that instrument the States surrendered to the new Nation certain portions of the judicial power naturally inherent in a sovereignty, and thereafter those portions of such judicial power were as completely withdrawn from the States as if they had never existed in the States. The State courts thereafter had no more right or jurisdiction to take cognizance of a case embraced in such cession of judicial power than if they never had possessed such right. So far as the State courts were concerned, it was as if judicial power over the subjects and parties specified had never existed anywhere.

The Constitution intrusts to Congress the duty of *distributing* the judicial power of the United States, so far as it is not distributed by the Constitution itself, but Congress can confer such power only where the Constitution expressly allows it to be conferred. Congress can make no distribution which would, either by express terms or by necessary effect or by possible effect, remove from the Federal judiciary any portion of the judicial power granted to the United States by the Constitution.

Certain attributes of sovereignty were delegated by the several States to the new Nation to be exercised for the benefit of the States themselves. Among these benefits which the States contracted for was the trial of controversies between their own citizens and other States in the courts of the Nation and not in the courts of those other States. The new Nation, having received this delegation of power, must exercise it only in accordance with the terms by which it

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was granted. It cannot in turn grant that power to another without express authority to do so. *Delegatus non potest delegare.* It cannot even give back to the States the power received from them except in the manner prescribed by the Constitution—*i. e.*, by amendment of the Constitution.

Such an amendment was adopted regarding the very power now under consideration. By the eleventh amendment to the Constitution it is provided that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." By this amendment the Nation ceded back to the States one-half of the judicial power acquired by the Nation under the Constitution in "controversies between a State and citizens of another State." Thereupon the States were reinvested with their original inherent right as sovereigns to take cognizance in their own courts of such controversies, where (if the State permits herself to be sued) the State is the defendant. But in all such controversies where the State is the plaintiff the judicial power remained unimpaired in the courts of the Nation.

We do not deny that the judicial power vested in the United States by the Constitution might be delegated if the Constitution had so provided, or that it may be exercised in any manner for which authority can be found in the letter and spirit of the Constitution, but we insist that it can be exercised only in such manner and not in a manner subversive of the letter or spirit of the compact and destructive of the object it was designed to attain.

The Constitution provides that the judicial power granted "shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." It is evident that those "inferior courts" cannot by any possibility be held to include State courts, for the State courts are neither "ordained" nor "established" by

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Congress. Furthermore, the same section contains provisions as to the compensation and tenure of office of the judges of those "inferior courts" which clearly are not applicable to State courts, for Congress has no control over those subjects in the States. It is also clear that Congress has no authority to confer upon a State court any judicial power which the Constitution declares *shall vest* in the Federal courts. Any attempt on the part of Congress to do so would be unconstitutional and void and no jurisdiction would be acquired by any State court thereby.

IV.

NATURE OF THE CONCURRENT JURISDICTION EXERCISED BY THE STATE COURTS.

It appears from the foregoing analysis of the transfer of judicial power from the States to the Nation that the judicial power of the United States vests *exclusively* in the courts of the Nation; that Congress cannot vest such power in any tribunal not authorized by the Constitution; and that no court can take cognizance, for any purpose, of a cause embraced within the constitutional grant of judicial power unless authorized to do so, either by the Constitution itself or by Congress acting under the Constitution.

It may appear, at first sight, that the principle stated above is in conflict with the judicial history of the country, for State courts are constantly taking cognizance of causes of the character enumerated in the constitutional grant of judicial power to the United States.

The question therefore arises,—Do the State courts, in rightfully taking jurisdiction and giving judgment in a case of the class to which the judicial power of the United States extends, exercise the *judicial power* of the United States? Obviously not, for Congress has no authority to vest that

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judicial power except in courts "ordained and established" by itself. The judicial power of the State (where not exclusively granted to the Nation) has remained unimpaired in the courts of the State except that, as to certain classes of cases, jurisdiction to hear and determine the controversy has been made subject to supervision by the courts of the Nation. Where Congress at the same time provides the means for such supervision, either by removal or appeal, so that the judicial power of the United States shall, as provided by the Constitution, "*extend*" to the controversies, it is competent for Congress to permit the State courts to resume the exercise of their suspended jurisdiction.

But we maintain, as a constitutional principle absolutely necessary to carry out the spirit and letter of the Constitution, that Congress has no right to vest concurrent jurisdiction in the courts of the States without providing means by which the judicial power of the United States "shall extend" to those cases so provided for in the Constitution. Such a jurisdiction becomes not concurrent in the State courts, but *exclusive*. Congress is authorized by the Constitution to "constitute tribunals inferior to the Supreme Court," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof" (article I, sec. 8, paragraphs 9 and 18). Congress has no power, by action or inaction, to nullify the Constitution in any particular. Congress may regulate the *manner* of exercising the judicial power of the United States, but it cannot abdicate such power.

We maintain that wherever the courts of the several States now rightfully exercise jurisdiction in any case embraced in the original grant of judicial power to the new Nation, they do so merely by virtue of a license to do so given by that Nation and not by virtue of any inherent power vested in the States themselves by right of sovereignty. It makes no

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difference that the States had originally possessed exclusively such judicial power by right of sovereignty. They had intrusted its control to a higher sovereignty by the most solemn and important political compact known to history—a compact which is still in full force and vigor.

If State courts now rightfully exercise such jurisdiction, therefore, it is evident that they cannot do so in any class of cases except where express authority from the United States appears, by a statute which is not repugnant to the letter or spirit of the Constitution. Their *judicial power* is derived from the sovereignty of their own State, but the right to exercise it, in any of the classes of cases included in the constitutional grant of judicial power to the United States, is a privilege granted by the sovereignty of the Nation. And in no case (unless the Constitution is to be nullified) can a State court take cognizance of any such case where statutory provision is not made whereby the case can be removed or appealed by the defendant to some Federal court for examination of the *merits* of the cause. The State courts take cognizance of such cases, not merely because those cases involve questions of general law properly cognizable in their own courts, but because the Nation authorizes them to do so, under such restrictions and regulations as shall preserve intact in the Nation the judicial power granted to it by the Constitution. It is within the undoubted power of Congress at any time to repeal a law by which the courts of the States are given concurrent jurisdiction in cases to which the judicial power of the United States extends, and we claim that thereafter the State courts could not exercise such jurisdiction.

"The principles established in a former paper teach us that the States will retain all pre-existing authorities which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is

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granted to the Union, and the exercise of a like authority is prohibited to the States; or *where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible.* Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression, I shall lay it down as a rule, that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

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"But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority.

* * * * * * *

"Either this must be the case," [appeal to the Federal courts] "or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, *else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor.* Neither of these consequences ought, without evident necessity, to be involved.

* * * * * * *

"The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, *receive their original or final determination in the courts of the Union.*"

The Federalist (Hamilton), No. 82.

It may be suggested, in opposition to the principle we are asserting, that there are still many cases of the classes embraced in the grant of judicial power (*e. g.*, controversies between citizens of different States) which are tried in the State courts, without the power of removal to the Federal courts, because the amount involved is below the jurisdictional amount of the Federal courts. The answer to that is—*de minimis lex non curat.* If "*minimis*" be regarded as a

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word hardly applicable to the present jurisdictional amount of the United States circuit courts, the answer is that Congress has established it as such, and until this Court shall declare that an amount so fixed by Congress is unreasonable (as would undoubtedly be the case were the amount ten times as great) the legislative definition of "*minimis*" must control.

The very fixing of a minimum amount for jurisdiction implies the assertion that suits involving a less amount are not of sufficient importance to invoke the Federal judicial power. Whatever view we may entertain regarding the power of Congress to limit, by a money value, except of the most trifling sum, the causes of Federal cognizance, its right to do so within reasonable limits, as a matter of public policy, is now too firmly established to be controverted. In Pollock *vs.* Farmers' Loan and Trust Company it was earnestly contended that an exemption from taxation of incomes below four thousand dollars was not so unreasonably high as to infringe the constitutional provision requiring uniformity of taxation.

157 U. S., 429.

The grant of judicial power is in different terms and of different effect from the power to regulate commerce granted by article I, section 8.

"Congress shall have power to regulate commerce" is a permission which may or may not be exercised, according to the will of Congress. But a provision that "the judicial power shall extend" to certain classes of cases is mandatory and not to be avoided.

The States, having given to the United States the power to regulate commerce, may still make regulations on that subject which do not interfere with the national welfare, until the United States, exercising the granted power, put an end to the power of the States.

Cooley *vs.* Board of Wardens, 12 How., 299.

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Not so with that portion of the judicial power formerly inherent in the States which was transferred to the United States by the Constitution. Such power is wholly gone out of the States and can no longer be exercised by the courts of the States, but only by the courts of the United States for the benefit of all the States.

Under the commerce clause of the Constitution, it now lies exclusively within the will of the Congress of the United States to act or abstain from acting under that clause. Not so with the Federal courts under the Constitution. They do not act *sua sponte*. They cannot exercise a single judicial function of their own motion, but only when moved to action by the action of a suitor in demanding relief at their hands. But when their action is invoked by a suitor, not only does the full judicial power exist in the courts but also the obligation to exercise it.

It is obvious therefore that there is a very marked and essential difference between the "power to regulate commerce" granted by the states to the United States and the "judicial power" granted by the same instrument but in studiously different language. One may be exercised or not at the will of the United States. The other must be exercised whenever invoked. One leaves in the states power to act until restrained by the superior action of the United States. The other vests immediately and absolutely in the United States all judicial power in the certain classes of cases enumerated. One might never be exercised by the United States, a situation easily conceived, and the Nation would still exist. The power would lie in the states for their wise exercise. The other must be exercised by the United States or the Nation goes to pieces. Conceive it to be possible for the United States to establish no courts and to appoint no judges. The judicial power granted by the Constitution could not, even in that event, be exercised by the states. Federal anarchy might result, but not any lawful exercise of that judicial power by State courts.

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But the power of the states to regulate commerce has its limitations, even before Congress acts.

Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states.

Leisy *vs.* Hardin, 135 U. S., 100.

Certainly the "subject-matter" embraced in the grant of judicial power, by language stronger than in the commerce clause, requires a "uniform system between the states" and so "cannot be encroached upon by the states." And especially is this so when the particular case involved is a controversy between a state and a citizen of another state, a case which each state has contracted should be tried in the courts of the United States and has thereupon and in consideration thereof relinquished the right to make war upon the other states in redress of wrongs done its citizens.

V.

NO CONCURRENT JURISDICTION IN CASES BETWEEN A STATE AND A CITIZEN OF ANOTHER STATE.

Congress has never directly conferred or attempted to confer upon the courts of the *States* concurrent jurisdiction of controversies between a State and citizens of another State. The only provision of law that may be construed in that way is found in section 13 of the judiciary act of 1789 and section 711 of the Revised Statutes. Said section 13 reads as follows:

"That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens,

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in which latter case it shall have original but not exclusive jurisdiction." * * *

1 Statutes U. S., 80.

It will be observed that the above law does not mention any court which shall exercise jurisdiction concurrent with that of the Supreme Court. So far as the terms of the act are concerned such concurrent jurisdiction may be exercised by any court, State or Federal, which, under the Constitution, or laws of Congress warranted by the Constitution, could take cognizance of the cause. The que-tion is whether Congress has any constitutional authority to pass an act which, if carried into execution, must necessarily remove from the consideration and determination of all courts of the United States cases to which by the Constitution the judicial power of the United States extends, and whether Congress has done so.

Section 711 provides as follows:

"SEC. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States. * * *

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens."

Upon a careful reading of these provisions it is seen that the act of 1789 neither by direct words nor by implication confers jurisdiction upon any State court over any case between a State and citizens of another State. The language of that act is perfectly consistent with the idea that a portion of this original jurisdiction of the Supreme Court was to be exercised concurrently with some inferior court of the United States then or thereafter to be established. Such concurrent jurisdiction was by section 9 of the same act conferred upon the district courts of the United States, *exclusively* of the courts of the several States, in all suits

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against consuls, a class of cases which is also within the original jurisdiction of the Supreme Court under section 2 of article III of the Constitution.

But section 711 of the revision apparently goes a step further, and although it does not in terms grant to the State courts jurisdiction concurrent with the Supreme Court in cases between a State and citizens of another State, yet it does seem to do so by implication. It is possible (and we ought, out of respect to the revisers and to Congress, to say *probable*) that this apparent grant of jurisdiction to the State courts by implication was an oversight arising from the attempt to tabulate in one section provisions of law that had been enacted in a different manner. The revisers certainly overlooked the fact that by no law was the correlative and essential power of removal of such cases from the State courts provided for. It is impossible that Congress could have intended by the enactment of a revision of the laws to violate the Constitution. It is not necessary, therefore, to argue that either the judiciary act of 1789 or the revision of 1874 was unconstitutional, for they contain no express unconstitutional grant of jurisdiction. It is only necessary for us to argue against such a *construction* of those acts as would make them unconstitutional.

Conceding that the jurisdiction of the Supreme Court in cases in which a State is a party, while original, is not exclusive, it certainly lies as much within the power of Congress to confer jurisdiction in those cases upon an inferior court of the United States as upon a court of a State. If the States will consent to submit their controversies to an inferior court of the United States and if there is nothing in the letter or spirit of the Constitution to the contrary, Congress may confer concurrent jurisdiction in cases where a State is a party upon the circuit or district courts of the United States, as it did in case of consuls.

But a violation of the spirit of the Constitution, and, indeed, of its letter, is found in any attempt on the part of

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Congress to confer *exclusive* jurisdiction upon the courts of the States in cases where a State is a party. It is evident that an act of Congress must be regarded not only in its language, but in its effect, in order to ascertain whether or not it does so confer exclusive jurisdiction upon the courts of the States. Conceding for the moment what we do not admit, the right of Congress to confer concurrent jurisdiction upon a State court in a case in which the Constitution itself vests original jurisdiction in the Supreme Court, because the *parties* are a State and a citizen of another State, it is evident that Congress in so doing must provide means by which the defendant may invoke the judicial power of the United States and obtain the judgment of the courts of the United States upon the merits of the controversy, whether or not they involve a Federal question. But neither the judiciary act of 1789 nor any subsequent act provides for the removal into the courts of the United States of causes between a State and citizens of another State, which involve no Federal question, although such acts do provide for removal in the other cases where the States are allowed to exercise concurrent jurisdiction in controversies to which the judicial power of the United States extends.

If no court of the United States except the Supreme Court has, under the Constitution and laws, jurisdiction to consider the case, then the right of the defendant to remove the case into the Supreme Court must be secured by appropriate legislation, for it is evident that unless this right of removal exists the jurisdiction of the State court is made *exclusive* of the courts of the United States, and that the judicial power of the United States no longer extends to certain cases to which the Constitution declares it *shall* extend. An act which should purport to do so would be unconstitutional.

But if Congress has no power to confer upon a State court exclusive jurisdiction of such a case it is also true that Congress cannot grant to another the right to make such juris-

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diction exclusive. Congress cannot put it into the power of either party to the cause to make the jurisdiction of the State court exclusive, whether that party be a State or an individual.

If Congress can give the State a right to sue a citizen of another State in her own courts and does not provide the means by which that citizen can remove the cause into the only United States court having jurisdiction, then Congress bestows upon the plaintiff in that suit the right, at her option, to make the jurisdiction of the State court exclusive of the courts of the United States. The State has an undoubted right to sue a citizen of another State in the Supreme Court of the United States. That a citizen of another State had originally the same right to sue a State in that Court was conclusively established in Chisholm *vs.* Georgia. The right of the citizen was taken away by the eleventh amendment to the Constitution. So that if the right of Congress to confer concurrent jurisdiction upon the State court in a suit by that State against a citizen of another State without at the same time providing means by which the citizen may remove the cause into a Federal Court be admitted, it follows that we must look to the caprice or self-interest of the plaintiff and to her option based thereon, and not to the Constitution of the United States, in order to ascertain whether jurisdiction in that case be vested in the courts of the State to the exclusion of the courts of the Nation. Can it be doubted how that option will invariably be exercised or that it will result in depriving the Supreme Court of jurisdiction over this class of cases, a jurisdiction which may at any moment become of vital importance to a State or to the Nation?

"We must presume that Congress did not mean to exclude from our jurisdiction those controversies the decision of which the States had confided to the judicial power and are bound to give to the Constitution and laws such a meaning as will make them harmonize."

Rhode Island *vs.* Massachusetts, 12 Peters, 723.

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The existence of the eleventh amendment itself sufficiently negatives the idea that a State may sue a citizen of another State in her own courts, without the possibility of removal or appeal on the merits by the defendant. Had it not been intended that such controversies should be immediately or ultimately determined by the Federal courts, the entire clause would have been repealed, not half of it.

VI.

REASON FOR THE CONSTITUTIONAL PROVISION.

But whether the State courts, in cases to which the judicial power of the United States extends, take jurisdiction by virtue of the sovereignty which created them, subject to be divested of such power by Congress, or whether they act only by virtue of powers expressly conferred upon them by Congress, there remain some limitations inherent in the Constitution itself upon the power of the State courts to act and upon the power of Congress to authorize them to act. Congress has no more power to violate the spirit than the letter of the Constitution, and neither Congress nor the courts of the States have any right, by conferring or exercising judicial authority, to remove from that instrument any protection or guarantee which it affords to the contracting parties—*i. e.*, the several States to whom it owes its existence, or to their citizens.

The books are full of the reasons why jurisdiction to decide controversies between States and citizens of other States was conferred by the Constitution upon the courts of the Nation.

"It is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: * * *

"8. To controversies between a State and citizens of another State, because, in case a State (that is, all the citizens of it)

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has demands against some citizens of another State, it is better that she should prosecute their demands in a national court than in a court of the State to which those citizens belong, the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter, and true republican government requires that free and equal citizens should have free, fair, and equal justice."

Chisholm *vs.* Georgia, 2 Dallas, 475.
Martin *vs.* Hunter's Lessee, 1 Wheaton, 323.

"It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: * * * 4th, to all those which involve the peace of the Confederacy; whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; * * * and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

* * * * * *

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

* * * * * *

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior

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to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body. * * * Whatever practices may have a tendency to distract the harmony of the States are proper objects of Federal superintendence and control.

It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, *the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.* To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

* * * * * * *

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the Federal courts as the proper tribunals for the determination of controversies between different States and their citizens."

The Federalist (Hamilton) No. 80.

"The State tribunals could not be expected to afford that degree of impartiality which the circumstances of these several cases required."

Curtis' Constitutional History of United States, edition 1889, vol. 1, 599.

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It was the very object of the framers of the Constitution in providing a national tribunal for the trial of controversies between a State and citizens of another State to protect those citizens. Indeed, the States, under the order of things existing before the adoption of the Constitution, did not need protection. They sued those citizens in their own courts and certainly could not complain if justice were not done therein. The chief object of this provision of the Constitution was to protect one citizen of a State against injustice at the hands of the whole body of citizens of another State. So firmly was this idea imbedded in the minds of those who adopted the Constitution that when, shortly afterward, a citizen sued the State of Georgia it was vehemently contended before the Supreme Court and by protest and memorial of States that the Constitution was not intended to embrace a case where the State was the defendant, but only where it was plaintiff. (Chisholm *vs.* Georgia, 2 Dallas, 419.)

"Its jurisdiction in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have, is that, if a State should wish to bring a suit against a citizen, *it must be brought before the Federal court.* This will give satisfaction to individuals, as it will prevent citizens, on whom a State may have a claim, being dissatisfied with the State courts. It is a case which cannot often happen, and if it should be found improper it will be altered."

Madison, in Virginia Convention. Elliot's Debates, vol. 3, page 533.

And shortly following the judgment of the Supreme Court that its jurisdiction extended to cases where a State was the defendant, the people of the United States, by a constitutional amendment, enforced their view of what the Federal compact ought to have been and took away from the national courts jurisdiction in cases where a State was defendant. But even in adopting that amendment the people were

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careful to preserve the constitutional right of a citizen of each State not to be sued by another State in the courts of that other State.

"It is settled law, as established by well-considered decisions of this Court, pronounced upon full argument and after mature deliberation, notably in *Cohens vs. Virginia*, 6 Wheat., 264; *Osborn vs. B'k*, 9 Wheat., 738; *Mayor vs. Cooper*, 6 Wall., 247; *Gold Washing & W. Co. vs. Keyes*, 96 U. S., 199 and *Tennessee vs. Davis*, 100 U. S., 257"—

"That while the 11th amendment of the National Constitution excludes the judicial power of the United States from suits in law or equity commenced or prosecuted against one of the United States by citizens of another State, *such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual*, in which the latter demands nothing from the former but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State."

"That a case in law or equity *consists of the right of one party as well as of the other*, and may properly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."

"These propositions, now too firmly established to admit of or to require further discussion, embrace the present case and show that whether we look to the Federal question raised by the State in its original petition or to the Federal question raised by the company in its answer, the inferior State court erred as well in not accepting the petition and bond for the removal of the suit to the circuit court of the United States as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal."

Railroad Company *vs.* Mississippi, 102 U. S., 135.

"There is an additional consideration which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might

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be plaintiffs and would elect the national forum, but also for protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. *Yet if the construction contended for be correct, it will follow that as the plaintiff may always elect the State court the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights.*" * * *

Martin *vs.* Hunter's Lessee, 1 Wheaton, 348.

So eminent a jurist as Justice Story has declared in Martin *vs.* Hunter's Lessee that "there is certainly *vast weight* in the argument which has been urged that the Constitution is imperative upon Congress to vest *all* the judicial power of the United States in the shape of original jurisdiction in the supreme and inferior courts created under its own authority." But we now merely seek to preserve a jurisdiction already vested by the Constitution itself.

Our contention, so far from being an attack upon the rights of the States, is in reality a defense of those rights. The States, being originally sovereigns, had the full power of sovereigns to protect their citizens against injustice or oppression by any other nation or State. If a citizen of a State failed to meet with justice at the hands of another State or foreign power, his sovereign could assert his rights either by negotiation, by arbitration, or in the last resort, by war. But by the adoption of the Constitution each State relinquished as against each other State the sovereign power of so protecting its own citizens.

"No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Constitution, Article I, Section 10 (3).

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It must be evident that the States surrendered their sovereign character so far as to submit themselves and their citizens to the arbitrament of a tribunal not created by themselves only for very good reasons. It is also evident that Congress can do nothing to impair the value to the several States or their citizens of such surrender of sovereign power or take any action which tends to impair the rights which the States or their citizens thereby acquired.

VII.

EFFECT OF THE SUIT BY THE STATE.

The State of Louisiana sued the Plaquemines Tropical Fruit Company of New Jersey on January 25, 1892, in a court established and maintained by herself, thus being in effect both party and judge. The State appeared merely as a claimant of lands claimed by the company and not in the assertion of her sovereignty and the suit was not, therefore, within the sanction of the rule in Wisconsin *vs.* Pelican Ins. Co. (127 U. S., 265). It was, on the contrary, precisely the kind of a suit which the fathers determined and the Constitution declares shall be decided by Federal tribunals.

The defendants pleaded their foreign domicile as a bar to the jurisdiction of the court (Record, page 20; printed Record, 13) but the plea was overruled. There was then no escape from a trial of the merits in the State courts, for there was no Federal question involved in the suit, by which it could have been been taken on the merits of the case to the Supreme Court of the United States.

1 Statutes U. S., 85 (section 25).

Rev. Stats. U. S., 709.

Act of February 18, 1875, 18 Stats. U. S., 318.

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Neither could the suit be removed so that its merits might be tried in the circuit court of the United States, for although the judiciary act provides for the removal of suits between citizens of different States it contains no provision for the removal of a suit between a State and a citizen of another State. Nor does the revision of the statutes.

1 Statutes U. S., 79 (section 12).
Rev. Stats. U. S., section 639.
Act of March 3, 1875, 18 Stats. U. S., 470.
Act of March 3, 1887, 27 Stats. U. S., 552.
Act of August 13, 1888, 25 Stats. U. S., 434.

Thus all the evils which the Constitution was designed to avoid are encountered. We submit that it is impossible that the State courts should have possessed a jurisdiction so subversive of the spirit and the letter of the Constitution. We claim, therefore, that the State courts of Louisiana had no jurisdiction in this controversy because, first, they never received an express grant of jurisdiction from the United States; and, second, that such a grant, if actually made, conferring absolute jurisdiction, uncontrolled by Federal revision, in cases between a State and citizens of other States is contrary to the Constitution and therefore void.

It is no doubt true that this result, arising from the nonaction of Congress, was not intended. But Congress can no more set aside the Constitution unintentionally than it can by premeditated intent. If Congress cannot take away from the judicial power of the United States by positive enactment, it cannot do so by mere lapse or omission.

It follows that the proceedings of the courts of the State of Louisiana, having by the fundamental law of the land no jurisdiction to determine controversies between that State and the citizens of other States, are absolutely void, and the judgment of no effect. We claim that the State of Louisiana, although she has not chosen to appear voluntarily in

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a Federal Court, must do so or cease to assert her demand against the complainant herein.

The case of Ames *vs.* Kansas (111 U. S., 449), upon which the defendant relied below did not, as we read it, decide anything contrary to the principle herein contended for. The contention there was that the jurisdiction of the Supreme Court was both original and exclusive, and the case arose upon the refusal of the circuit court to entertain the controversy when removed from the State court of Kansas. The decision was that the circuit court of the United States should entertain the cases upon removal, inasmuch as they involved a Federal question, the Supreme Court deciding that the original jurisdiction of the Supreme Court "was made concurrent with *any other court to which jurisdiction might be given* in suits between a State and citizens of other States or aliens." It was not decided that the State courts had such concurrent jurisdiction, but that the inferior courts of the United States possessed it, which is in no way contrary to our position. The court quoted approvingly from the decision of Chief Justice Taney on the circuit in Gittings *vs.* Crawford (Taney, page 1), as follows:

"In the clause in question there is nothing but mere affirmative words of grant and none that import a design to exclude the subordinate jurisdiction of *other courts of the United States* on the same subject-matter."

111 U. S., 468.

Nor is the recent decision of this Court in Postal Telegraph Cable Co. *vs.* State of Alabama (155 U. S., 482), relied upon below, in conflict with our position. In that case this Court decided that the circuit court of the United States had no jurisdiction because "the suit was one brought by the State to recover taxes and penalties imposed by its own revenue laws," and therefore not cognizable in the circuit court, under the decision in Wisconsin *vs.* Pelican Insurance Co. (127 U. S., 265).

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Nor is the recent decision of this Court in case of California *vs.* Southern Pacific Company (157 U. S., 229) opposed to the principle for which we contend. In that case the State of California sued the corporation by original bill in the Supreme Court of the United States. But the Court dismissed the bill on the ground that in addition to the corporation citizen of another State, there were other necessary parties defendant who were citizens of the plaintiff State, and held that suits between a State and its own citizens are not included within the jurisdiction of the Court granted by the Constitution. This was a mere reassertion of the principle previously established in suits between citizens of different States. The partiality or unfairness of State courts may well be supposed not to exist against her own citizens, and therefore not against citizens of other States joined with such defendants, and the reason for the Federal jurisdiction may well be held not to exist.

Gittings *vs.* Crawford (Taney, page 1), referred to above, merely decided that the original jurisdiction of the Supreme Court was not exclusive of that of the *circuit courts of the United States*, a ruling which is entirely within the principle which we are asserting.

The case of Börs *vs.* Preston, 111 U. S., 252, also relied upon below, is not at all in point. The only question decided was whether or not a consul of a foreign government was properly sued in the circuit court of the United States instead of in the district court of the United States. The only resemblance even remote to this case is that by the Constitution the Supreme Court is given original jurisdiction in cases affecting the consuls and those in which a State shall be a party. But Congress has in the former case given concurrent jurisdiction not to *State courts*, but to inferior courts of the United States. This is perfectly compatible with our position, which we state again in order to avoid any possible risk of being misunderstood.

We do not contend that a citizen, when sued by a State,

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is guaranteed by the Constitution of the United States the trial of that case in the *Supreme Court* of the United States. We do claim that he is guaranteed by the Constitution a trial in *some* court of the United States. If Congress has granted original jurisdiction in that class of cases to any inferior court of the United States, a trial in that court would be all that another State could demand for her citizens, or the citizens for themselves. It would be a complete fulfillment of the constitutional guarantee. If, however, Congress has not granted jurisdiction to any inferior Federal court, it follows that, until Congress does so act, the States are guaranteed a trial for their citizens in the *only* Federal court which does have jurisdiction, and that is the Supreme Court. The essence of our contention is, however, not a trial in this Court, but a trial in some one of the Federal courts.

It has been suggested to us that "it cannot be seriously contended that a State cannot sue a citizen of another State for even a small sum in any other court than the United States Supreme Court, and yet that is the logical consequence of the position assumed."

But we do contend very seriously for just that principle, except where the State sues for penalties or otherwise in the exercise of her sovereign powers and not as an ordinary litigant. It is extremely unlikely that the time and attention of the Supreme Court will be taken up by suits of States against citizens of other States regarding trivial matters, for the States do not bring many civil suits, and in any event would resort to that tribunal only in cases of great importance. It is not to be presumed that the States would put themselves to the great inconvenience and expense which would necessarily attend the bringing of suit in that Court merely for the purpose of endeavoring to carry into an absurd extreme a great constitutional principle and safeguard. Nor is it to be presumed that citizens will be controlled by different considerations than those influencing States.

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But it is not to be doubted that if the Supreme Court should be embarrassed by the presence on its docket of a large number of suits by States against citizens of other States prompt relief would be found in congressional action. This Court has always found a willing disposition in Congress to afford such relief whenever necessary, and all that would be necessary for Congress to do would be to provide by a simple enactment of a few lines that the jurisdiction of the courts of the States shall be concurrent with that of the Supreme Court in cases where a State shall sue a citizen of another State and at the same time provide for the removal of the cause into that Court by the citizen (or by either party) under proper regulations.

We are confident that there would be no abuse of that right. Such legislation would give to State courts the jurisdiction in such controversies which they do not now possess. The citizen would have to decide before trial whether the condition of the State courts is such as to make it imperative upon him, in order to secure justice, to remove his cause into the Supreme Court. Unless the necessity is great he will be deterred by considerations of expense and inconvenience arising from distance from the Court and the manner of presenting his case there. But where the courts of the State are in such a condition, from whatever reason, as to overcome all these considerations, then there is, from that very fact, no provision of the Constitution that should be more jealously guarded than the one which we are endeavoring to maintain.

"The chief difficulty of the condition of affairs existing before the Constitution lay not so much in the hazards of a violation of a principle through local prejudice, or the superior force of local policy or legislation—although these influences were always powerful—as in the fact that, when these influences were likely to be most active, or were most feared, there was no tribunal to which resort could be had, and which was known to be beyond their operation and their reach. The articles of compact between the States had

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intended to remove from the citizens of the different States the disabilities of practical alienage under which they would have stood in the tribunals of each other. But with that mere declaration those articles stopped. If the litigant saw that the local law was likely to be administered to him as if he were a foreigner or feared that the scales of justice would not be held with an impartial hand, *he could go nowhere else for a decision.* This was a great evil; for much of the value of every judicature depends upon the confidence it inspires."

Curtis, Constitution History of United States, vol. 1, 598, edition of 1889.

Congress might also afford more effectual relief by providing that the States may sue citizens of other States in the inferor courts of the United States, exercising concurrent jurisdiction with the Supreme Court in that class of cases, and may provide for the removal of such cases from the State courts to such inferior United States courts. The power of Congress to do this is unquestioned, for Congress has already given to such inferior courts concurrent jurisdiction in certain cases where the Supreme Court has original jurisdiction. It cannot be doubted that, after the passage of such an act, a State having occasion to sue a citizen of another State would bring that suit in the United States court situated within her own boundaries in all cases except those of great importance. The State would exercise the option whether to sue in the Supreme Court or in the inferior court of the United States, and we apprehend that dignity would yield to more practical considerations except in cases where the dignity of the State might be substantially involved.

Furthermore, the removal of the cause by the citizen might be limited to removal into an inferior court of the United States. Of this neither he nor his State could complain, for although the Constitution guarantees the right to have the controversy with another State tried in a *Federal* court it does not guarantee the right of trial in the *Supreme* court. But if the bringing of a State into an inferior court of the

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United States be considered to be an infringement of the dignity of the State, we reply that a State could avoid such loss of dignity, if she deems the case of sufficient importance, by bringing the suit in the Supreme Court, since she alone would have the initiative and the option of two tribunals. Exercising the option of instituting the suit in her own courts, knowing that the statutes provide for the removal of such suit into an inferior court of the United States, would certainly leave the plaintiff State without ground of complaint.

It will be seen, therefore, that if our contention that a State cannot sue a citizen of another State in her own courts be sustained, whatever temporary inconvenience might possibly ensue would arise, not from the construction which the court gives to the Constitution, but from the failure of Congress to take the simple action necessary to afford relief. If found necessary it cannot be doubted that Congress will act.

But this discussion grows beyond the case. If a constitutional right exists it will be maintained by the Court, and the principle which governs is most admirably stated by Chief Justice Marshall as follows:

"It is most true that this Court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Cohens *vs.* Virginia, 6 Wheaton, 404.

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VIII.

THE PRESENT DEFECT IN STATE JURISDICTION ABSOLUTE.

The fact that the defendant Plaquemines Tropical Fruit Company is a citizen of the State of New Jersey clearly appeared in the record in the State court, as well as the fact that the plaintiff was the State of Louisiana, in the original petition filed by the plaintiff State and elsewhere. We maintain that, such fact being apparent on the face of the petition and record, the court acquired no jurisdiction, because the nature of the suit was not one confided to the judicial power of that court. Although the court was a court of general jurisdiction it could only act, in cases embraced within the grant of judicial power to the Federal Government, where permitted to do so by that Government.

We contend that the courts of the States are, so far as they exercise any jurisdiction which, under the Constitution, is lacking in the sovereignty that creates them, courts of special or limited jurisdiction. They are courts of general jurisdiction as to all matters within the power of the sovereignty creating them, but assuredly they are not courts of general jurisdiction as to matters arising outside of the territorial limits of that sovereignty or as to matters arising within the territorial limits of that sovereignty, but outside of the limits of the sovereign power. As to such cases, if they can by the comity of nations or sovereigns exercise any power at all, it is of a limited nature and extends only to what is expressly conferred by that other sovereignty. An example of this is found in the consular courts which are established in some semi-civilized nations, in which the character of the court, its personnel and procedure are established by some one or more civilized nations, but the *jurisdiction* of the court is limited to such parties and subject-matter as may be expressly authorized by the foreign sovereignty. Precisely analogous is the case where State courts exercise

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any part of the judicial power which inherently belongs from its very birth to the sovereign Nation established by the *people* of the United States. For all purposes the courts of the State when exercising such jurisdiction are courts of limited jurisdiction, and wherever they seek to take cognizance of either *parties* or *subject-matter* which by the fundamental law of the Constitution is inherent in the United States they are bound to make their jurisdiction appear.

"The proceedings of no court can be deemed valid further than its jurisdiction appears."

Turner *vs.* Bank of North America, 4 Dallas, 11.

"A court of general jurisdiction," says the supreme court of New Hampshire, "may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law and *which do not belong to it as a court of general jurisdiction.* In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and *as to the persons to be affected by it,* must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." (Mores *vs.* Presby, 5 Fost., 302.) * * *

"But where the special powers conferred are exercised in a special manner, not according to the course of the common law, *or where the general powers of the court are exercised over a class not within its ordinary jurisdiction* upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.

"The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects *or other persons* a more extended and general jurisdiction. Upon this subject the commentators on Smith's Leading Cases, after referring to numerous decisions holding that in

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such cases the record must show a compliance with the provisions of the statutes conferring the special jurisdiction, very justly observe that 'the inconveniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches that from whatever source power may come it will fail of effect when unaccompanied by right.'" (Vol. 1, p. 1012.)

Galpin *vs.* Page, 18 Wall., 350.
United States *vs.* Tarble, 13 Wall., 397.
Dred Scott *vs.* Sandford, 19 How., 691.
Williamson *vs.* Berry, 8 How., 542.

Only a very slight analysis is necessary to make it evident that the principle so clearly enunciated in the decision just cited is applicable to the present case. In that decision the jurisdiction of courts is shown to be limited by the *territorial* limits of the sovereignty under which they are constituted and from which they derive their authority. This is because as a principle of national jurisprudence, sovereignty is, as a rule, coextensive with territorial limits, and in the case then under discussion it was not necessary for the court to proceed further and consider the additional and vital principle peculiar to the jurisdiction of courts within the territorial limits of the United States. In every State of the Union two judicial systems exist, exercising jurisdiction within the same territorial limits. Both systems are limited in their jurisdiction, not only by the territorial limits within which such jurisdiction is exercised, but by the limits of power in the sovereign from which they derive their existence. Neither system can exercise jurisdiction beyond the limits of the power of the sovereignty under which it exists any more than it can beyond the geographical limits of the territory within which it is exercised; so that an attempt on the part of a State court to take jurisdiction, either of subject-matter or over parties rightfully within the jurisdiction of the other sovereignty, is without validity and is in effect extra-territorial.

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"It is argued, that the circuit court of the United States had no authority to question the jurisdiction of the county court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not.

"We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned, when its proceedings were brought, collaterally, before the circuit court. We know nothing in the organization of the circuit courts of the Union which can contradistinguish them from other courts in this respect.

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

"This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Elliott *et al vs.* Peirsol's Lessee *et al.*, 1 Peters, 340.
Williamson *vs.* Berry, 8 Howard, 541–543.

Furthermore, if there was an absolute lack of jurisdiction in the State court, either on the ground that it had not been conferred or that it cannot under any circumstances be conferred, the jurisdiction in the State court was entirely wanting and need not be pleaded.

"An objection to jurisdiction on the ground of exemption from the *process* of the court in which the suit is brought, or the *manner* in which a defendant is brought into it, is waived by appearance and pleading to issue (10 Peters, 473: *Toland*

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vs. Sprague, 12 Peters, 300); but when the objection goes to the *power of the court over the parties* or the subject-matter, the defendant need not, for he cannot give the plaintiff a better writ or bill."

Rhode Island *vs.* Massachusetts, 12 Peters, 719.

A plaintiff may even assign for error the want of jurisdiction in that court to which he has chosen to resort.

Capron *vs.* Van Noorden, 2 Cranch, 126.

In the present case, because there was no statute of the United States authorizing appeal or removal to the Federal courts, the defendant citizen of New Jersey had no method of getting the decision of the merits of the controversy out of the State courts of Louisiana and into the Federal courts. Nothing that it could have done would have so shaped the case that the judicial power of the United States would "*extend*" to this case, to which the Constitution says it "shall extend." But the constitutional provision was not thereby destroyed. The only effect of the situation was that the State court acquired no jurisdiction.

Whether the defendant's plea to the jurisdiction was sufficient in its terms or whether it filed any plea whatever was therefore not material. Even the defendant's consent to the jurisdiction could not have conferred jurisdiction under circumstances so subversive of the compact between the States.

"There can be no failure of rights by laches in a case where consent would be altogether nugatory."

Cooley, Const. Limitations, 399.

"We have uniformly held that if a State court wrongfully refuses to give up its jurisdiction on a petition for removal and forces a party to trial he loses none of his rights by remaining and contesting the case on its merits. It is also a well-settled rule of decision in this Court that when a sufficient case for removal is made in the State court the rightful jurisdiction of that court comes to an end and no further

proceedings can properly be had there, unless in some form its jurisdiction is restored."

Baltimore & Ohio R. R. Co. *vs.* Koontz, 104 U. S., 5.
Insurance Co. *vs.* Dunn, 19 Wall., 214.
Removal Cases, 100 U. S., 457.
R. R. Co. *vs.* Miss., 102 U. S., 135.
Chesapeake & Ohio R. R. Co. *vs.* White, 111 U. S., 134.
Gordon *vs.* Longest, 16 Peters, 97.

This is the principle applied when the case in the State court is one between citizens of different States, and the germ of the principle is that as soon as, by proper petition, the jurisdictional fact appears on the record of the State courts, showing that the circuit court of the United States has jurisdiction, cognizance of the case is *eo instanti* removed from the State court and all proceedings in that court thereafter are null and void. As said in Insurance Co. *vs.* Dunn, "The further proceedings of the common pleas was a clear case of usurped jurisdiction. The illegality was gross. The action of the district and supreme courts of the State gave them no validity. The maxim that consent cannot give jurisdiction applied with full force." And, as said in Gordon *vs.* Longest, "Every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court or the court of appeals, was *coram non judice*." In the same case it is said, "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which *all who were non-residents* or aliens might resort for legal redress. But this object would be defeated if a State judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause."

16 Peters, 104.

The same "great object" was the reason why the Constitution entrusts the determination *of the merits* of suits by a

State against a citizen of another State to the Federal judiciary. Can it be contended that, because Congress has failed to carry this constitutional requirement into effect by providing for the removal of such a suit commenced in a State court into some court of the United States, the constitutional provision is thereby nullified and destroyed? We maintain, on the contrary, that, inasmuch as Congress has provided no means for such removal, it is impossible that any jurisdiction to hear a cause by a State against a citizen of another State was legally and constitutionally vested in the courts of that State. And we maintain that as soon as the essential jurisdictional fact—viz., that the suit is by a State against a citizen of another State—appears on the record of the State court its jurisdiction ceases *eo instanti* as fully and for the same reasons as stated in the cases cited above. Subsequent proceedings are *coram non judice* and absolutely null and void.

It follows that the Civil District Court for the Parish of Orleans and the Supreme Court of the State of Louisiana had no jurisdiction in the suit brought by the State of Louisiana against the Plaquemines Tropical Fruit Company, and that the judgment therein rendered is no bar to the suit by the latter against the grantees of the State.

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